EUROPEAN COMMUNITIES AND ITS MEMBER STATES – TARIFF TREATMENT OF CERTAIN INFORMATION TECHNOLOGY PRODUCTS

WT/DS375, WT/DS376, WT/DS377

COMMENTS OF THE UNITED STATES ON EC'S ANSWERS TO THE PANEL'S QUESTIONS TO THE PARTIES AND U.S. QUESTIONS TO THE EC IN CONNECTION WITH THE SECOND SUBSTANTIVE PANEL MEETING

July 31, 2009

Comment on EC Response to Panel Questions 100 and 103 and US Questions 1-3

1. The EC responses to these questions are once again premised on its theory that the headnote is "exhausted" by the tariff codes in the table that follows it, as well as the "safety net" theory the EC has advanced as a supposed alternative to its theory of exhaustion.[1] The United States has explained in its submissions why the exhaustion theory is fundamentally flawed — including that (1) it contradicts the text of the headnote itself, which provides for duty free treatment to described products "wherever...classified", not merely to products "classified in the tariff codes in the table that follows" the headnote;[2] (2) it would mean that ITA participants added the headnote to their Schedules for no reason at all, as they simply could have bound the relevant tariff codes at zero;[3] and (3) it would mean that the headnote is *inutile* (a position at odds with principles of treaty interpretation reflected in the Vienna Convention on the Law of Treaties and statements of the Appellate Body in previous reports regarding the importance of giving effect to treaty provisions).[4]

2. The only response the EC has offered to date is its supposed "safety net" theory of the headnote,[5] and again, when pressed to explain why the headnote is contained in its Schedule, the EC falls back once again upon this theory in its answers.[6] Yet given the fundamental flaws in the "exhaustion" theory, and because the "safety net" theory is the only alternative[7] explanation the EC has offered to date, the EC statements in its answers on this subject bear further comment.

3. First, the EC responses beg the question of in what respect the "safety net" theory of the headnote differs from complainants' interpretation. For example, in its response to Question 100, the EC states that the headnote "may have been considered necessary as a 'safety net' in view of the significant differences between ITA participants when implementing the ITA commitments into their Schedules as reflected in the differences in the headings included next to

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[1] *E.g.,* EC Answers to Second Panel Questions, para. 14 (claiming that "[t]he codes next to the narrative description indeed exhaust the headnote (to the extent the headnote cannot be used as a kind of a 'safety net')").

[2] *E.g.*, U.S. First Written Submission, para. 30; U.S. Second Written Submission, para. 11; U.S. Answers to Second Panel Questions, para. 7.

[3] *E.g.*, U.S. Second Written Submission, para. 13.

[4] *E.g.*, U.S. Second Written Submission, para. 14.

[5] *E.g.*, EC Answers to Second Panel Questions, para. 1.

[6] *See* EC Answers to Second Panel Questions, para. 1.

[7] It may be noted that whether it is in fact an alternative to the exhaustion theory remains unclear — again in its answers, the EC states that even under the "safety net" theory, the headnote is "exhausted." EC Answers to U.S. Questions, para. 1.

the product definitions."[8] In this statement, the EC appears to recognize that (1) at the time the ITA was concluded, there was no agreement among participants on the classification of Attachment B products, (2) participants recognized that some *additional* provision was necessary to ensure that Attachment B products would receive duty-free treatment, and (3) the headnote was this provision. Given this statement, it is unclear in what respect the EC disagrees with the complainants' position — in particular, that the headnote is a separate commitment, *additional* to the commitments associated with individual tariff lines in the EC Schedule, to provide duty free treatment to Attachment B products "wherever...classified",[9] and that the Attachment B product descriptions are not limited to products falling within the particular enumerated subheadings in the table after the headnote.[10] In response to a question from the United States, the EC offers a somewhat more elaborate explanation of its "safety net" theory, which suggests that the only differences are the following: the EC's belief that, in order to prevail, complainants must "demonstrate that there are other headings than those identified" in the table that follows the headnote that would "correspond to the product definition" of the Attachment B product, and its assertion that this demonstration "must be subject to a strict burden of proof."[11]

4. On the first point, the EC's position begs the question of why, in the EC's view, it is insufficient for complainants to demonstrate — as they have — that the EC measures result in the application of duties to products covered by the product description contained in Attachment B, by interpreting the product description itself and the EC measure at issue. The EC nowhere explains why it is necessary first to identify a particular subheading in which a product is classified and to explain whether or not it is included in the table that follows the headnote, and then to demonstrate that these headings correspond to the product definition. In fact, whether the product is classified in a particular subheading the EC identified as associated with that product description, or not, is *irrelevant*. The headnote, by its terms, provides for duty-free treatment "wherever...classified." Indeed, as the EC acknowledges, participants did not agree on classification of Attachment B products at the time the ITA was concluded — and notified different codes in the table that follows the headnote.[12] To this day, ITA participants do not agree on which subheadings correspond to the product definitions in Attachment B. As the EC

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[8] EC Answers to Second Panel Questions, para. 1.

[9] *E.g.*, U.S. First Written Submission, para. 30; Japan First Written Submission, paras. 231-235; Chinese Taipei First Written Submission, paras. 174-177.

[10] *E.g.*, U.S. Answers to First Panel Questions, para. 113; Japan Answers to First Panel Questions, para. 22; Chinese Taipei Answers to First Panel Questions, p. 5 (Response to Question 7).

[11] EC Answers to U.S. Questions, para. 1.

[12] EC Answers to Second Panel Questions, para. 1.

itself explains, lack of agreement on classification of the products was the reason ITA participants included the headnote in their Schedules,[13] to ensure duty-free treatment to the products in question "wherever ... classified."

5. Likewise, as the United States explained in its responses to the Panel's questions, as a result of changes in WCO classification opinions, changes in classification practice by particular Members, and other developments, the codes in the table in a particular Member's Schedule may not even reflect which subheadings the Member *itself* considers as covering the Attachment B product in question.[14] Moreover, some Members — in particular, Japan — did not even include a table of codes in their Schedules.[15] When asked what obligations Members that do not have a table would have with respect to a particular product, the EC states only that "[i]f the list of tariff headings ... was found not to be complete, this list would need to be updated."[16] Thus, the premise of the EC's argument appears to be that, if the list is not updated — or, as is the case with Japan, if the list does not exist — the Member *has no obligation* to provide duty-free treatment to the Attachment B product in question. This is simply illogical. It would suggest that, even though all ITA participants agreed to provide duty-free treatment to all products included in the ITA (both in Attachment A and Attachment B), some participants are entitled to impose duties on ITA products included in Attachment B merely because the tables in their Schedules do not reflect their latest classification practice,[17] and others are entitled to impose duties on all Attachment B products, merely because they did not include a table in their Schedules at all.

6. On the second assertion by the EC — regarding "strict burden of proof" — the EC has offered utterly no support for the claim that a special burden of proof applies to complainants in this case (or indeed explained what this "strict burden" would entail).[18] The headnote is a concession included in the EC's Schedule. Those concessions are subject to the obligations

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[13] EC Answers to Second Panel Questions, para. 1.

[14] E.g., U.S. Answers to Second Panel Questions, paras. 13-17.

[15] *See* U.S. Answers to First Panel Questions, para. 15 n.13.

[16] EC Answers to U.S. Questions, para. 4.

[17] For example, with respect to PC/TVs, the EC position suggests that the fact that it made a technical correction to its Schedule to reflect the PC/TV classification opinion issued by the WCO, but the United States did not, means that the United States (and the more than 27 other ITA participants that submitted their ITA Schedules before the WCO opinion was issued but did not make a similar correction) has no obligations under Attachment B with respect to PC/TVs.

[18] EC Answers to U.S. Questions, para. 1.

contained in GATT 1994 Article II:1(a) and (b), and, like other concessions in the Schedule, the headnote is itself an integral part of the GATT 1994. Nothing in the text of the concession at issue, nor in the DSU, supports the conclusion that a unique burden applies in this case. As for the ordinary burden of proof that applies in dispute settlement proceedings, the United States submits that it has met its burden.

Comment on EC Response to Question 102

7. While the EC asserts that its interpretation of the obligations in question are consistent with the ITA, read as a whole, it may be noted that, beyond asserting (without explanation) that paragraph 1of the ITA is "ambiguous", it nowhere explains how the portions of the ITA that complainants have cited can be read consistently with its view that it is entitled to impose duties on ITA products merely because they incorporate new features or technologies, and its reliance on paragraphs 2, 3, and 5 of the ITA to support its argument is misplaced.[19]

8. On the first point, the United States refers the Panel to its previous submissions and in particular the discussion of why the EC's interpretation of its commitments do not accord with paragraph 1 of the ITA, which provides that Members' trade regimes should "evolve" in a manner that "enhances market access" for information technology products, and the preamble, in which participants expressed the desire to "achieve maximum freedom of world trade in information technology products" and to "encourage the continued technological development of the information technology industry on a world-wide basis."[20]

9. On the second point, none of the provisions cited support the EC position. With respect to paragraph 2, as complainants have noted, participants committed in paragraph 2 to provide duty free treatment to "all products specified in Attachment B", and Attachment B covers the specified products "wherever they are classified in the HS."[21] Paragraph 2 of the Annex similarly reflects participants' commitment to modify their Schedules to provide duty-free treatment to all products in Attachment B, consistent with paragraph 2, and as noted in paragraphs 3-5, supra, participants did so.[22] Paragraph 3 of the ITA Annex pertains to "additional products" — not products that fall within the terms of the concessions — and paragraph 5 simply establishes a mechanism for working toward common classification of IT

[19] EC Answers to Second Panel Questions, para. 6.

[20] *E.g.*, U.S. First Written Submission, paras. 106-108.

[21] U.S. Answers to Second Panel Questions, para. 1.

[22] *See* also U.S. Answers to Second Panel Questions , para. 18.

products.[23] None of these provisions permit the conclusion that a product which meets the terms of the concessions in the EC Schedule may nonetheless be subject to duty, simply because it incorporates new features or technologies.

10. Finally, it may be noted that the acquisition of new features or technologies is neither unique to ITA products — automobiles, light bulbs, and any number of other goods become more advanced over time — nor a new development.[24] As complainants have noted, the concessions at issue are those contained in the EC's Schedule. If the EC reading of these concessions were accepted, it would suggest that tariff concessions resulting from the ITA are somehow more limited than those for other goods. This is directly contrary to the language of the EC Schedule when read in context (including the ITA itself, which as noted in the preamble was intended to encourage technological innovation), and in light of the object and purpose of the GATT 1994.

Comment on EC Response to Question 108

11. In response to Question 108, the EC concedes that ITA participants did not intend to "freeze" concessions in time, thereby not taking into account technological development.[25] However, it then proceeds to assert that (1) "the products in particular in Attachment B were often defined in exceptional technical detail" and (2) when a product "changes so much that it effectively becomes a different product" or when an ITA and non-ITA product "merge," the products are no longer covered by its concessions.[26] Whatever their merits (and they are offered without support), it may be noted that neither assertion is relevant to the concessions at issue in the instant dispute.

12. On the first, the EC does not even indicate whether *it* considers the concessions at issue in this dispute to contain such "exceptional technical detail," and a cursory review of each demonstrates that neither the STB nor FPD concessions are limited in this way (indeed, for example, the FPD concession by its terms covers a wide range of technologies).[27] As for the second, as complainants have explained, for no product has the EC demonstrated that either scenario has occurred. For "set top boxes", the EC does not claim that the product is

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[23] Exhibit US-1, p. 4.

[24] See e.g., U.S. First Written Submission, paras. 96-97 (discussing Group of Experts report in GATT dispute *Greek Increase in Bound Duty*).

[25] EC Answers to Second Panel Questions, para. 13.

[26] EC Answers to Second Panel Questions, para. 13.

[27] *See* U.S. Answers to Second Panel Questions, para. 8.

"effectively...a different product" — indeed, it concedes that the devices are "set top boxes" and that they have "a communication function."[28] For MFMs, as complainants have explained, insofar is the product is a "merged" product, it is the result of the merger of two *ITA* products (a scanner and a printer)[29] — yet according to the EC, the resulting device nonetheless falls outside of its commitments. Finally, for "flat panel display devices," the EC has failed to demonstrate that the mere presence of a DVI interface or the ability to connect to a device other than a CPU renders a product a "video monitor" — indeed, its entire theory (that any device that functions as a television or "video monitor" is excluded) is premised on language that does not even appear in the FPD concession (but rather is a separate concession on CRT monitors) and that makes no reference to video monitors.[30]

Comment on EC Response to Question 109

13. The EC's attempt in its response to characterize the modifications it made to its Schedule in 2000 as somehow consistent with its "exhaustion" theory and at the same time to distinguish its actions with respect to PCTVs simply highlights the basic flaws in its interpretation of the headnote to its Schedule. With respect to the concession for STBs, the EC ignores the significant fact that it did not merely notify the additional line in 2000, but notified it as a tariff line *associated with* the Attachment B description of STBs. Having conceded that that description did not change in 2000, the only logical conclusion one can draw from the EC's notification was that it recognized that the products included in CN 8528 12 91 were among the products meeting the description of STBs which have a communication function, within the meaning of ITA Attachment B. If the headnote was "exhausted", there would be no reason for the EC to modify the table at all — it might simply have bound the relevant tariff line at zero.[31]

14. Furthermore, there is no material difference between the action the EC took in 2000 with respect to STBs and that which it took in 1998 — both reflected classification changes in the EC (one a change brought about by decisions of the EC's own customs authorities, the other a result of EC implementation of a WCO classification opinion), affecting a product covered by

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[28] *E.g.*, U.S. Second Written Submission, paras. 37-38.

[29] *E.g.*, U.S. First Written Submission, para. 71; U.S. Second Written Submission, para. 111.

[30] EC Answers to Second Panel Questions, para. 116.

[31] It may be noted that the EC also continues to insist (incorrectly) that it did not add a bound commitment for subheading 8528 12 91 as part of its 2000 modification, and instead only added the line to the list in the Attachment B table. Regarding the addition of subheading 8528 12 91 to its Schedule as a bound commitment, *see e.g.,* U.S. Opening Statement at Second Panel Meeting, paras. 19-20.

Attachment B of the ITA. In both cases the EC maintained duty-free treatment for the product in question, notwithstanding the fact that the subheadings in which it considered the product classified were not originally included in the table following the Attachment B headnote in its Schedule. For the EC to claim that it "enlarged" its commitment in one case, but was simply "maintaining" its commitment in the other simply does not make sense. Regarding the interpretative significance of the table more generally, and the PCTV modification in particular, *see also* paragraphs 3-5, supra.

Comment on EC Response to Question 110

15. As noted in the U.S. response to Question 110, whatever actions the EC may take to implement the *Kip* and *Kamino* rulings or update its measures to reflect its adoption of HS2007, they are not relevant to evaluating the measures within this Panel's terms of reference and the Panel should not consider them for purposes of determining whether or not those measures are consistent with the EC's obligations.[32] The measures at issue remain in effect; the evidence demonstrates that the mere fact that the EC has adopted HS2007 nomenclature has not prevented EC customs authorities from using pre-HS2007 measures as a basis for classification decisions, and the *Kip* and *Kamino* judgments do not themselves alter the measures at issue in this dispute.[33]

16. Indeed, the EC indicates that it does not consider *Kip* "directly relevant for the classification of MFMs under the current CN,"[34] and offers no specifics for whether or when it would modify the CN to reflect its newfound view that "there may be other ADP MFMs" in addition to those capable of reproducing fewer than 12 pages per minute, that should be accorded duty-free treatment.[35] With respect to *Kamino*, as complainants note, the *Kamino* court did not address the 2007 CNENs, and while the Commission appears to believe that the "necessary clarifications to the CNEN are straightforward,"[36] it has failed to date to make any modifications or even publicly issue any proposals in the many months since the decision was issued. Likewise, none of the regulations at issue are affected by *Kamino*, and while the EC continues to assert that they are "effectively inapplicable," merely due to the change in nomenclature, the evidence demonstrates that this is not the case — EC customs authorities continue to refer to pre-

[32] U.S. Answers to Second Panel Questions, paras. 20-22.

[33] U.S. Answers to Second Panel Questions, paras. 20-22.

[34] EC Answers to Second Panel Questions, para. 23.

[35] EC Answers to Second Panel Questions, para. 24.

[36] EC Answers to Second Panel Questions, para. 25.

HS2007 regulations as a basis for making classification determinations.[37]

Comment on EC Response to Question 111

17. With respect to the EC's response to this question, it may simply be noted that while the EC in its response to Question 111 refers to a purported "negative list" of products that were excluded from the ITA, no such list exists.[38] Neither the ITA nor participants' Schedules specify products that are to be excluded — rather, they specify products that are entitled to duty-free treatment. Indeed, none of the purported "negotiating history" cited by the EC even supports this position — at most it consists of nothing more than a handful of documents indicating some participants' initial views on product coverage. None of the documents indicate which products were ultimately covered. To identify those products, one need look no further than the EC's Schedule of Concessions and, in the case of the Attachment B headnote, the agreed upon text of the ITA to which it refers.

Comment on EC Response to Questions 121 and 122

18. The EC appears to concede that CNENs are at a minimum "norms" that "are intended to have general and prospective application."[39] As for whether they "create expectations among the public and among private actors" and whether when a CNEN is known to customs authorities, "they are going to follow it," the EC states that this depends on the "clarity" of the CNEN and whether it is consistent with the CN.[40] The EC does not, however, proceed to explain whether it considers the CNENs in this dispute "clear" or consistent with the CN. In this regard, it may be noted that, as the EC has itself acknowledged, the language of the CNENs at issue is "categorical", and the evidence demonstrates that EC customs authorities have consistently applied them, with the result that any device with the arbitrary characteristics identified therein are subject to duty.[41] Thus, the CNENs at issue in this dispute do not appear to suffer from lack of clarity.

19. Furthermore, neither CNEN at issue in this dispute has been found inconsistent with the CN — contrary to what the EC asserts in paragraph 35, the *Kamino* court did not "declare ... inapplicable or ... otherwise interpret" the FPD CNEN (which was issued in 2006, and therefore

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[37] *E.g.*, U.S. Answers to First Panel Questions, para. 46 n.45.

[38] EC Answers to Second Panel Questions, para. 26.

[39] EC Answers to Second Panel Questions, para. 34.

[40] EC Answers to Second Panel Questions, para. 34.

[41] *E.g.*, U.S. Second Written Submission, para. 34.

was not even part of the 2004 CNENs discussed in the court's judgment),[42] and the EC itself has nowhere even suggested that the STB CNEN is inconsistent with the CN. Thus, it is reasonable to conclude that even under the EC's criteria, the CNENs at issue in this dispute "create expectations among the public and among private actors" and that, when known to EC customs authorities, they have followed them.

Comment on EC Response to Question 126

20. The EC's assertion that a machine which can make copies and which is connectable to an ADP system or to a network may nonetheless be classified in CN 8443 32 91 appears premised on an incorrect interpretation of the phrase "connectable to an ADP machine or network."[43] As the United States noted in its responses to the Panel's questions, the HSENs to subheadings 8443.31 and 8443.32 explain that this phrase denotes that the apparatus comprise all the components (including software and hardware) necessary for its connection to an ADP machine (for printing) or network (for printing or faxing) to be effected simply by attaching a cable.[44] While the EC asserts that "the mere fact that a copying machine is connectable to an ADP system or network does not necessarily make it capable of … printing and faxing" and that to be capable of printing and faxing it "may need to be equipped with … additional components," this assertion begs the question of what additional components the EC believes the device would require.[45] That is, for a device to be capable of copying and to be "connectable to an ADP system or network" (within the meaning of the HSEN), given that no additional components would be necessary (other than a cable) to link the device to a computer or network, it is unclear why the device would nonetheless not be fully capable of printing or faxing at the time of importation. Any device having a print engine and capable of connecting to an ADP system would be capable of receiving data from it for printing. The same connectivity board which would allow the machine to send scanned data to the CPU of an ADP system would also handle data from the CPU for printing.

21. As for the EC's assertion that these devices would fall outside of the scope of complainants' panel request, footnote 15 of that request defined the term "MFMs" to refer to "machines which perform two or more of the functions of printing, copying, or facsimile transmission, capable of connecting to an automatic data processing machine or to a network (including devices commercially known as MFPs (multifunctional printers), other 'input or

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[42] U.S. Oral Statement at the Second Panel Meeting, para. 29.

[43] EC Answers to Second Panel Questions, para. 47.

[44] U.S. Answers to Second Panel Questions, para. 40 n.62.

[45] EC Answers to Second Panel Questions, para. 49.

output units' of 'automatic data processing machines', and facsimile machines."[46] There is no basis to conclude that the devices described by the EC do not fall within this definition.

Comment on EC Response to Question 127

22. The United States notes that it does not consider it necessary for the Panel to make findings on what the EC characterizes as an "alternative defense" to the complainants' claim regarding MFMs, in particular the assertion that some MFMs may be covered by the concession for HS96 8472 90.[47] As noted, and contrary to what the EC asserts, complainants claim that the EC measures result in the imposition of duties on products in excess of the commitments set forth in the EC Schedule, contrary to GATT 1994 Articles II:1(a) and (b) and the EC's Schedule.[48] Determining whether all MFMs fall within the EC's concession for HS96 8471 60 or whether some meet the description of goods associated with the EC concession for HS96 8471 60 and others fall within HS96 8472 90 is unnecessary to evaluate this claim, as the 6% duty levied on MFMs under the EC measures exceeds both the EC's bound duty for HS96 8471 60 (0%) and that for HS96 8472 90 (2.2%).

Comment on EC Response to Question 130

23. Regarding the EC suggestion that the WCO Secretariat's comments on the classification of MFMs in heading 9009 were "somewhat unusual" in their "activism", this is simply incorrect.[49] In any given case, the WCO Secretariat may in its comments simply identify different options or indicate a preferred option, as it did in the case of MFMs. There is nothing unusual about the Secretariat's comments in this regard (and even if it were the case that it is unusual for the Secretariat to provide such a strong critique of one position, a more logical conclusion would be that the strength of the critique was a reaction to the weaknesses in the position now advanced by the EC, not, as the EC claims, to division among WCO members).[50]

24. Furthermore, there is utterly no support for the EC's assertion that the WCO Secretariat "relied very heavily" on industry views in the case of MFMs.[51] In fact, the material submitted by

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[46] *See* WT/DS375/8, n.15.

[47] EC Answers to Second Panel Questions, para. 57.

[48] *E.g.*, U.S. Second Written Submission, para. 102.

[49] EC Answers to Second Panel Questions, para. 72.

[50] EC Answers to Second Panel Questions, para. 72.

[51] EC Answers to Second Panel Questions, para. 78.

the EC indicates that the Secretariat expressly invited views from the EC to assist it in preparing its report,[52] and nothing in the process of developing the Secretariat's report suggests any bias on the part of Secretariat staff. Rather, the report suggests that technical classification experts (including experts having technical and scientific backgrounds), reviewing the evidence before them (including evidence provided by the EC), came to the conclusion that MFMs are not "photocopying apparatus" and should not be classified in subheading 9009.12.

Comment on EC Response to Question 134

25. With regard to the application of Article 31 of the *Vienna Convention on the Law of Treaties*, the United States refers the Panel to its Response to Question 134. Regarding the EC's suggestion that the HS2007 could be used as a supplementary means of interpretation of the commitments in the EC's Schedule of Concessions, the EC's discussion of this point is hypothetical, as the example it describes (where there has been no change to the relevant provisions of the nomenclature between HS1996 and HS2007) does not apply in this case. The United States disagrees with the EC that the HS2007 could be used in this manner in any event. As noted, the EC's concessions were drafted in HS96 nomenclature. Modifications to the HS agreed upon nearly ten years after the relevant concessions were made provide no insight into the meaning of those concessions. (In addition, as the United States has noted before, WTO Members have not certified their Schedules in HS2007 nomenclature, and therefore there is not even agreement among Members regarding the relationship between that nomenclature and Members' concessions.)

Comment on EC Response to Questions 138 and 139

26. In its responses to these questions, first, the EC again misstates the claim before the Panel and again resorts to language that does not appear in the FPD concession to argue that that concession is more limited than its ordinary meaning read in context and in light of the object and purpose of the GATT 1994.[53] As complainants have repeatedly explained, the EC measures result in the application of duties to any FPD merely because it is equipped with a DVI interface or capable of connecting to a device other than a computer, and as a result, they are inconsistent with its obligations under its Schedule of Concessions and GATT 1994 Articles II:1(a) and (b). To demonstrate that the measures at issue are inconsistent with the EC's obligations, the complainants need to demonstrate that the measures result in the imposition of duties on at least some products covered by the concessions — they need not demonstrate that every single FPD is entitled to duty free treatment, as the EC appears to suggest in its response.

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[52] *See* Exhibit EC-124, paras. 6, 9.

[53] EC Answers to Second Panel Questions, paras. 111-113.

27. Furthermore, the EC again refers to language that appears in the CRT monitor provision and not the FPD provision to attempt to narrow its commitment with respect to FPDs.[54] As noted, this approach is contrary to the text of the provisions themselves and otherwise unsupported. Regarding the effect of *Kamino* and whether the EC excludes from duty free treatment any device with DVI, the evidence shows that in fact EC customs authorities do automatically exclude any such device. On *Kamino* and EC implementation more generally, please see paragraphs 15-16, supra.

28. Regarding the question of whether or not the device described in question 138 is, as the EC puts it, "capable of being used with an ADP machine," it should also be noted that, as explained in the U.S. response, the physical characteristics identified in the question are in fact not sufficient to determine whether or not that is the case. Furthermore, as noted previously, the HS96 Explanatory Notes are not a basis to classify all products with tuners in a dutiable subheading — heading 8471 includes devices both solely and principally for use with ADP systems. HSENs cannot supersede the language of heading 8471 (as the ECJ observed in *Kamino* in rejecting a similar argument advanced by the Commission).[55]

Comment on EC Response to Question 143

29. In its response to this question, the EC points to certain converter boxes that it claims are "specifically designed to drive Apple Cinema Displays or similar monitors without the assistance of an ADP machine."[56] Nothing in the material the EC has submitted indicates that this is the case. In fact, based on the manuals (including the pages of the manual most recently cited by the EC), the products in question appear designed for professional video editing purposes — a circumstance in which a user would be using the device with a CPU.[57] Even if it were possible to connect devices in addition to a CPU to the converter (and nothing in the manual indicates that this is so), the fact remains that the Apple Cinema Displays are "solely" for use with computers. As noted in the U.S. response to this question, the manual for the Apple display indicates that a CPU is a system requirement for operating the device.[58] Furthermore, even from a classification standpoint, as the EC elsewhere acknowledges in its responses, devices are evaluated as

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[54] EC Answers to Second Panel Questions, para. 116.

[55] U.S. Second Written Submission, para. 100.

[56] EC Answers to Second Panel Questions, para. 122.

[57] *See e.g.,* Exhibit EC-116, pp. 6-7 (discussing use of the display with video editing computer software).

[58] U.S. Answers to Second Panel Questions, para. 61.

presented upon importation, without regard to other components the user might later add.[59] The possibility that a device could be used for a purpose other than what is intended is not a basis for deeming it something other than what its objective characteristics upon importation indicate it to be. In this case, the evidence demonstrates that the Apple Cinema Display is a device that cannot be used without a CPU, and as such is "solely" for use with computers.

Comment on EC Response to Question 146

30. As noted in the U.S. response to this panel question, while the United States observed the relation between the hard disk and other elements of the set-top box to illustrate the factual inaccuracies underlying the EC's notion that these devices do not have a "main purpose communication function," this is ultimately irrelevant to the inquiry at hand. Whether or not a device has a "main purpose communication function" is not relevant to the determination of whether a device is a set top box or has a communication function, under the terms of Attachment B of the ITA and the EC's headnote, and indeed all parties agree that the devices at issue are in fact "set top boxes."[60] The EC in its response neither explains why "main function" is relevant to determining whether or not a device is a set top box, nor disputes that the devices at issue are set top boxes.

31. With regard to the EC's assertion that the factual statements the United States has offered regarding the relationship between the recording and communication function are "at odds with technological reality," none of the material the EC has submitted supports this conclusion and its reliance on paragraphs 64 and 65 of its second oral statement is misplaced.

32. As the United States noted, the hard disk is not central to the operation of a set top box. In the case of a set-top box, if the hard disk malfunctions, the box still enables the viewing of digital signals sent over a cable, satellite, or other communication channel, and the box still enables interactive information exchange.[61] Conversely, if the set-top box cannot decode signals sent over a communication channel, it cannot record programming. In contrast, in the case of a VCR, the device has no other functionality besides recording (and playing) videocassettes, and can record from a variety of devices even without itself converting and decoding signals over a

[59] *Compare* EC Answers to Second Panel Questions, paras. 51-52 (stating with respect to MFMs that if when a device is presented at the border, "it may be necessary to add some physical components in order to render operational" additional functions, the EC would treat the device as a single-function apparatus).

[60] *See* U.S. Answers to Second Panel Questions, para. 66.

[61] *See* U.S. Second Written Submission, para. 30 & Exhibit US-121.

communications channel. The United States has also noted that many set-top boxes are not available for retail sale but instead are sold by cable or satellite service providers that provide television, Internet, and other services, and it is the set-top boxes that enable their customers to receive these services (in contrast to a VCR, which a customer purchases at a retail outlet to allow that customer to record television signals).[62] This is a further indication that these devices are not "main purpose recording function" devices.

33. The EC's assertions during the second panel meeting are equally flawed. First, the fact that an STB has a video decoder is irrelevant[63] even to determining its "main" function — STBs (even those without hard disks) have video decoders to enable a television set to receive and decode digital television broadcasts.[64] Likewise, the EC's reliance on a Frequently Asked Questions document for one type of set-top box is equally misplaced — indeed, the document contains one question discussing how to operate the product *in conjunction with* (and not as a substitute for) a video cassette recorder.[65] As for the EC's assertion that consumers buy the product for the recording function,[66] it is offered without any evidentiary support.

Comment on EC Response to Question 147

34. In its response, the EC once again demonstrates that, beyond generalities regarding classification practice in the EC, it is unable to identify any circumstance in which it has accorded duty-free treatment to set top boxes which have a communication function and a hard disk.[67] The EC can point to no evidence indicating that it would in fact classify the products in a duty-free line, whether from the EC measure itself or from actions of its customs authorities. The complainants in contrast have identified specific language in the CNEN that directs customs authorities to place any STB equipped with a device capable of performing a recording or

[62] *See e.g.,* Exhibit US-122, p. 1.

[63] EC Opening Statement at the Second Panel Meeting, para. 64.

[64] *See* U.S. First Written Submission, para. 42.

[65] Exhibit US-122, p. 2.

[66] EC Opening Statement at the Second Panel Meeting, para. 70. The EC's assertion that set-top boxes without a hard disk cost half as much as those with a hard disk is likewise offered without support.

[67] EC Answers to Second Panel Questions, para. 125.

reproducing function, such as a hard disk, in a dutiable subheading.[68] Furthermore, complainants have submitted over ten BTI demonstrating that, in every case, EC customs authorities have in fact subjected any device with a hard disk to duty.[69] The EC has been unable to identify a single BTI or other action of its customs authorities that would support the opposite conclusion. Furthermore, contrary to what the EC suggests as an explanation for its failure to offer any contradictory evidence, STBs with a hard disk are imported into the EC and importers have requested BTI on numerous occasions for STBs with a hard disk.[70] The evidence indicates that, in response to each such request, EC customs authorities have automatically classified the product in a dutiable heading, consistent with the "categorical" language in the CNEN.

Comment on EC Response to Questions 149 and 150

35. In its responses to these questions, the EC introduces yet another artificial basis to distinguish between modem technologies — this time, based on the assertion that in order to qualify as a modem, a device must enable "*direct* transmission and communication with the Internet." This criterion is at odds with the ordinary meaning of the term "modem" in the EC's concessions, when read in context and in light of the object and purpose of GATT 1994, the definition of a modem contained in the EC's measure, and the EC's own statements elsewhere in this proceeding.[71] Furthermore, as a factual matter, the EC is simply incorrect in asserting that "direct transmission" provides a basis to distinguish between cable and dial-up modems, on one hand, and Ethernet and WLAN modems on the other.

36. First, no definition of "modem" provided by any party to this proceeding supports the conclusion that for a device to qualify as a modem it must connect "directly" to the Internet. Nor does the EC identify anything in the concession at issue that would support this interpretation of the obligation. In fact, as the United States has explained, no devices provide for "direct" communication to the Internet as the EC defines the concept — all modems provide access to the Internet through a network (and the EC's attempt to distinguish between "public" and "private" networks is equally untethered to any textual or factual support).[72] Setting aside the purported

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[68] *E.g.*, U.S. First Written Submission, paras. 46-49; U.S. Second Written Submission, paras. 26-29.

[69] Exhibit US-28.

[70] EC Answers to Second Panel Questions, para. 129.

[71] *See e.g.,* EC Second Written Submission, para 224; EC Opening Statement at the First Panel Meeting, para 44.

[72] U.S. Answers to Second Panel Questions, para. 72.

distinction between public and private networks, the EC response in fact confirms that the transmission and communication to the Internet performed by dial-up and cable modems is no more or less direct than that performed by an Ethernet or WLAN modem — all provide access to a network, and in so doing enable communication with the Internet.[73] The EC also correctly notes that its own measure nowhere refers to this criterion as a basis for distinguishing between technologies, and indeed concedes that its measure contains factual inaccuracies in its characterization of Ethernet and WLAN devices. Thus, the EC explanation amounts to nothing more than a *post hoc* attempt to justify the arbitrary distinctions drawn by its measure, an attempt that is supported neither by the concessions at issue nor by the facts.

Comment on EC Response to Questions 151, 152, and 153

37. Regarding ISDN modems, the EC concedes that ISDN devices allow "direct" access to the Internet,[74] yet offers still another artificial basis to distinguish between modem technologies — this time, the requirement that devices perform analog to digital conversion. Of course, as the United States has noted in its submissions, the EC measure nowhere refers to this as a basis for determining whether or not a device is a modem, and were this a prerequisite for devices to be considered "modems", cable modems would not necessarily qualify — as the United States noted, cable modems may not convert digital to analog signals (or vice-versa), depending on the types of signals and the medium in which such signals are carried.[75] Finally, regarding the EC's reference to evidence it submitted in an attempt to show that ISDN modems are not modems, the United States refers the Panel to the response to that evidence it provided in its opening statement during the second meeting of the Panel with the parties.[76] The EC in its answers offers no reply, but instead simply refers the Panel to its previous assertions.

Comment on EC Response to Questions 154, 155, and 156

38. The EC's responses to questions 154-156 raise significant issues. First, the EC incorrectly equates the phrase "made effective" in GATT 1994 Article X:1 and "enforced" in GATT 1994 Article X:2 with measures that have been "adopted" and have "entered into force" — specifically, measures "which can no longer be modified or withdrawn by the government without undergoing again the legislative or quasi-legislative process leading to their adoption and

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[73] *See* EC Answers to Second Panel Questions, paras. 132 and 135.

[74] *See* EC Answers to Second Panel Questions, para. 146.

[75] *See* U.S. Answers to Second Panel Questions, para. 69 and Exhibit US-140.

[76] U.S. Opening Statement at the Second Panel Meeting, paras. 23-24.

entry into force."[77] With respect to Article X:1, nothing in Article X:1 supports this interpretation, even putting aside for the moment the fact that the EC appears erroneously to equate "adopt" for purposes of the WTO Agreement with "adopt" as used in a particular Member's domestic legal system.

39. Indeed, the GATT 1994 elsewhere uses the term "adopt," so it would be incorrect to assume that there is no significance to the fact that the drafters chose to use the different terms "made effective" in Article X:1 and "taken" in Article X:2. For example, Article IX:2 uses "adopt" and "enforce."[78] By contrast, Article XI:1 also uses "made effective" but this would not make sense if read to mean "adopted." Nor would the EC's approach make sense in the context of Article XX(g) which also uses the term "made effective" since nothing in Article XX(g) would require that the measures be "adopted" in conjunction with restrictions on domestic production or consumption.[79]

40. Similarly the EC errs in equating "made effective" with "in force."[80] The term "in force" is used in several other provisions of the GATT 1994.[81] Accordingly, it would not be correct to assume that there is no significance to the use of a different term in Article X:1.

41. As noted previously, a measure can be made effective by a Member even if every step in the formal domestic process for what is characterized as "adoption" under that Member's domestic legal system has not been completed — indeed, the evidence shows that this was the case for the STB CNEN. The EC position on the meaning of "enforced" is equally at odds with the terms of Article X:2 — contrary to its conclusory assertion that "clearly, enforcement of a measure presupposes that the measure that is to be enforced is adopted and entered into force", there may be circumstances in which a measure that has not been formally "adopted" as that term is used in a Member's domestic legal system is nonetheless being enforced by a Member. That is in fact precisely what occurred with respect to the STB CNEN.

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[77] EC Answers to Second Panel Questions, para. 151.

[78] *See also*, for example, Article XII:3(a)(which uses "adopt"), Article XX (which uses "adoption" and "enforcement"), Article XXXVI:9 (which uses "adoption"), and Article XXXVII:3(b)("adoption").

[79] *See also* Article XV:9(b) in which the term "make effective" is used but which again would not make sense to read as meaning "adopted," similarly with *Note Ad Articles XI, XII, XIII, XIV and XVIII.*

[80] EC Answers to Second Panel Questions, para. 151.

[81] *See, e.g.,* Article I:2 and I:4(a), Article II:1(b),

42. The EC's interpretation is premised on the notion that if it deems a measure a "draft" or "preparatory act" (because it has not taken the domestic legal step it calls "adoption"), it cannot be made effective or enforced — yet whether the EC considers a document a "draft" or "preparatory act" is not controlling.[82] The question is whether the measure was "effective" and "enforced", not what its status is in EC law. As noted the evidence demonstrates that the STB CNEN was both "made effective" and "enforced" before it was published by the EC.

Comment on EC Response to Question 163

43. While as explained in the US responses, the United States does not consider the phrase "established and uniform practice" relevant to the instant dispute, the EC interpretation of "established and uniform practice," like its interpretation of "made effective" and "enforced", is premised on the incorrect notion that if the EC considers a measure a "draft" or if it has not been "duly adopted" for purposes of EC domestic law, it cannot create an "established and uniform practice." Regarding the evidence, the EC asserts that the BTI provided is insufficient evidence of an established and uniform practice, yet again offers no evidence that would suggest that other member States were acting inconsistently with the CNEN after the vote of the Customs Code Committee. Furthermore, the EC ignores the other evidence submitted by complainants, including evidence indicating that the chairman of the Customs Code Committee in fact encouraged member States to follow the CNEN after the vote, as well as evidence indicating that, under EC law, once a vote has occurred, member States are precluded from issuing contradictory BTI. All of this material supports the conclusion that the STB CNEN, following the vote of the Customs Code Committee, effected an advance in a rate of duty and did so under an "established and uniform practice."

Comment on EC Response to Question 165

44. In its response, although it is not clear, the EC appears to take the view that "established and uniform practice" modifies "measure" such that the measure has to "result" from that

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[82] Regarding the EC suggestion in paragraph 163 of its responses that, with respect to a draft, only the "administrative instruction (which, together with sending the draft text also required it to be followed)" must be challenged as the measure, this assertion is equally premised on its view that the effect of a measure for purposes of domestic law is what controls. Even were it relevant, the evidence in this dispute — including statements of the customs code committee chairman encouraging member States to apply the CNEN before it was adopted — indicates that the CNEN was enforced at the behest of the Commission, not "rogue officials," and based on the evidence, the Panel could also properly find the "instruction" by the Customs Code Committee inconsistent with the EC's obligations under Article X. *E.g.*, U.S. First Written Submission, paras. 40, 116-117.

"measure."[83] This reading of Article X:2 is inconsistent with the text. As the United States has explained, the term "established and uniform practice" would appear to be best read as modifying "other charge on imports." In other words, Article X:2 makes the most sense if read:

> No measure of general application taken by any contracting party:
> (a) effecting an advance in--
> (i) a rate of duty or
> (ii) other charge on imports under an established and uniform practice, or
> (b) imposing a new or more burdensome requirement, restriction or prohibition on imports, or
> (c) on the transfer of payments therefor,
> shall be enforced before such measure has been officially published.

45. In other words, it is not just any advance in a charge on imports that must be officially published before being enforced, but only an advance in those charges "under an established and uniform practice."

46. The EC's approach, in contrast, would appear to read Article X:2 as though it said:

> "No measure of general application taken by any contracting party:
> (a) effecting an advance in--
> (i) a rate of duty or
> (ii) other charge on imports
> resulting in ~~under~~ an established and uniform practice, or
> (b) imposing a new or more burdensome requirement, restriction or prohibition on imports, or
> (c) on the transfer of payments therefor,
> shall be enforced before such measure has been officially published.

47. The EC's approach is contrary to the text of Article X:2. The EC also argues that the "practice" is only what occurs between when the measure is "issued" (the EC thereby introduces yet another term in addition to such terms as "made effective," "taken," and "adopted") and when it is "published."[84] Of course, the EC itself concedes these may happen simultaneously,[85] although the EC does not suggest then how the "established and uniform practice" could occur.

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[83] *See, e.g.,* EC Answers to Second Panel Questions, para. 201.

[84] EC Answers to Second Panel Questions, para. 189.

[85] EC Answers to Second Panel Questions, para. 150.